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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

EXRILLE DARILE WILSON,

Defendant and Appellant.

A153663

(San Mateo County
Super. Ct. No. 16-NF-013694-C)

Defendant Exrille Darile Wilson appeals from a judgment of conviction, following a jury trial, of three counts of automobile burglary. (Pen. Code, § 460, subd. (b).)¹ His appellate counsel has raised no issues and asks this court for an independent review of the record to determine whether there are any issues that would, if resolved favorably to defendant, result in reversal or modification of the judgment. (*People v. Kelly* (2006) 40 Cal.4th 106; *People v. Wende* (1979) 25 Cal.3d 436.) Defendant was notified of his right to file a supplemental brief but has not done so. Upon independent review of the record, we conclude no arguable issues are presented for review and affirm the judgment.

This case arose out of three automobile burglaries, one in Menlo Park in 2015 and two in Millbrae in 2017. Defendant was charged with three counts of automobile burglary (§ 460, subd. (b)) and two counts of active participation in a criminal street gang in regard to the Millbrae burglaries. (§ 186.22, subd. (a).) The information also alleged

¹ All further undesignated statutory references are to the Penal Code unless otherwise indicated.

criminal street gang enhancements as to the two Millbrae burglaries. The information further alleged two enhancements based on defendant's commission of the alleged crimes while released on bail or his own recognizance in two cases, one in San Mateo County and one in Santa Clara County. The information also alleged a second-strike conviction (§ 1170.12, subd. (c)(1)), a prior serious felony and a prior prison term (§§ 667, subd. (a)(1), 667.5, subd. (b)), and an allegation that he was ineligible for probation due to two prior felony convictions. (§ 1203, subd. (e)(4).)

The Evidence

At trial, Andrew Peacock testified under a grant of use immunity regarding the Menlo Park automobile burglary. In May 2015, he and Wilson drove in Wilson's car to Menlo Park. There, Peacock used a spark plug to break the window of a pickup truck and removed a briefcase. Peacock got back in the car, and Wilson drove away. Peacock admitted he was a member of Ghost Town, a criminal street gang in Oakland, but testified that defendant was not.

The two Millbrae automobile burglaries occurred in the parking lot of the Millbrae Pancake House. Oakland Police Officer Ruiz testified as a Ghost Town gang expert. He reviewed the surveillance videos from the two Millbrae Pancake House automobile burglaries. Based on his prior encounters with defendant and knowledge of defendant's appearance, Officer Ruiz identified one of the men involved as defendant. Although defendant's face was partially obscured, Officer Ruiz was able to identify him based on his height, clothing, "bottom face area," "the chest factor," and weight. He testified defendant was a large man, approximately six feet tall and over 300 pounds. Defendant's upper torso was distinctive in that he was "heavy-set" and had "breasts [that] are larger than normal." Officer Ruiz also opined that defendant was an active participant in Ghost Town, a criminal street gang.

The court admitted evidence of defendant's involvement in an uncharged incident in Millbrae in October 2016. In that incident, defendant was one of four individuals in an Acura that entered an In-N-Out restaurant parking lot in Millbrae. Three of the individuals exited the car and peered into car windows in the parking lot. They then

returned to the Acura, and moved it next to a vehicle they had been “checking out.” Police, who were conducting an “auto burglary detail” at the In-N-Out parking lot at the time, noticed the suspicious activity and moved their unmarked van behind the Acura. After police activated their siren and approached the vehicle, the driver put the Acura in reverse and “slammed into” the police van. Police took all four individuals, one of whom was defendant, into custody.

The court also admitted evidence of a recorded jail telephone call. In it, defendant states, “ ‘This case don’t even matter to [me], blood. Ain’t none of this s-h-i-t even matter to me, blood. I want to do what I got to do and go home, blood. I ain’t no innocent a-s-s, N-i-g-g-a. I done fed up. Did stupid s-h-i-t. Caught up doing s-h-i-t. If they can prove it or not, I don’t really care.’ ” Detective Cang of the San Mateo County Sheriff’s Office testified he believed defendant was referencing the Millbrae Pancake House incidents.

The court initially granted defendant’s motion to exclude the jail telephone call. After reading a transcript of the entire call, the court concluded “the call did, in fact, specify the matters that this was currently dealing with in this trial.” The court suggested certain portions could be redacted, but defendant’s attorney “indicated that he did not want any of the tape to be excluded. . . .”

In another recorded jail telephone call, defendant asked a male friend to go into his Instagram account and delete everything that wasn’t his “family.” Some of defendant’s Instagram posts were photographs of defendant, with known gang members, throwing gang signs and holding bundles of cash.

The trial court did not abuse its discretion in connection with any of these evidentiary rulings.

Jury Instructions

Based on defendant’s attempts to have certain Instagram posts deleted, the prosecutor sought to instruct the jury with CALCRIM No. 371, regarding destruction of evidence. Defendant objected, asserting there was not “enough evidence that [defendant] . . . is attempting to hide or destroy any evidence . . . as it relates to the jail phone call.”

The prosecutor maintained the attempted deletion of these posts showed consciousness of guilt regarding the gang charges. The court concluded the instruction was “appropriate.”

Defendant also objected to CALCRIM No. 372 regarding evidence of flight. He asserted his flight from the crime scenes had “no probative value.” The prosecutor indicated he was relying on flight as evidence of consciousness of guilt. The court allowed the instruction, noting that based on *People v. Williams* (1960) 179 Cal.App.2d 487, “the court would have a sua sponte duty to give 372.”

The trial court did not err in giving these instructions.

Sentencing

The jury could not reach a verdict as to the two charged counts of active participation in a criminal street gang, and the court granted the prosecutor’s motion to dismiss those counts, as well as dismissing the two street gang allegations (§ 186.22, subd. (b)(1)(A)), and dismissing the allegation of a prior serious felony conviction under section 667, subdivision (a)(1).

The court found true the allegation that defendant had suffered a prior second-strike conviction. Defendant filed a *Romero*² motion to strike the prior for the purposes of second-strike sentencing, which the court denied.

Although the court also found true the allegations that defendant had suffered a prior prison term (§ 667.5, subd. (b)) and found true two enhancements alleging defendant had been on bail or released on his own recognizance at the time of the commission of the crimes in counts one and four (§ 12022.1), it struck those enhancements at sentencing.

The trial court sentenced defendant to a total term of five years and four months. It imposed the low term of 16 months for the first count and 8 months, which is one-third the mid-term, for the remaining two counts. Pursuant to its “second strike” finding, the court doubled each of these terms under section 1170.12, subdivision (c)(1).

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

The court ordered defendant to pay restitution to four victims, for which he was jointly and severally liable with the individuals with whom he committed the crimes. The court imposed a restitution fine of \$300 plus a 10 percent administrative fee. (§ 1202.4, subd. (b).) It also imposed a court operations assessment of \$120, plus a conviction assessment of \$90, resulting in total fines and fees of \$540.00. (§ 1465.8, Gov. Code, § 70373.) The court also ordered a total of 580 days of deductions from his period of confinement under section 4019. The court further ordered a parole revocation fund fine, to be stayed pending successful completion of parole. (§ 1202.45.)

The trial court did not abuse its discretion or err in its sentencing.

Throughout the case defendant was ably represented by counsel.

DISPOSITION

Upon independent review of the record, we conclude no arguable issues are presented for review and affirm the judgment.

Banke, J.

We concur:

Humes, P.J.

Sanchez, J.

A153663, *People v. Wilson*